Supreme Court, U.S.
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No. 01-1159

In The

Supreme Court of the United States

JERRY CHARLES VAUGHAN,

Petitioner,

Against

FRED LAWRENCE COX, OFFICER, Individually and in his official capacity as an Officer of the Coweta County Sheriff's Department; COWETA COUNTY, GEORGIA; MIKE YEAGER, SHERIFF, in his official capacity as Sheriff of Coweta County,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals correctly applied settled qualified immunity law in holding that, as of January 5, 1998, it was not clearly established that shooting to disable a fleeing vehicle or its driver was an unconstitutional application of deadly force under the circumstances of this case, where even the plaintiff passenger admitted that the vehicle posed an immediate danger to the lives and safety of innocent motorists in its path.

LIST OF PARTIES

Jerry Charles Vaughan, Petitioner-Plaintiff
Fred Lawrence Cox, Respondent-Defendant

Sheriff Michael Yeager, in his Official Capacity,
Respondent-Defendant

Coweta County, Georgia, Respondent-Defendant

TABLE OF CONTENTS

Page

RESPONDENTS' COUNTER-STATEMENT OF THE QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

A. The Opinion Below Does Not Establish that Deadly Force is Justified to Stop Fleeing, Speeding Motorists 7

B. The Writ is Not Warranted to Consider a New and Special Treatment of the "Warning" Prong of *Tennessee v. Garner* for Qualified Immunity Purposes 10

C. The Court of Appeals Properly Analyzed the Question of Qualified Immunity Within the Factual Context of this Case 12

D. The Writ is Not Warranted to Resolve Any Conflict Among the Circuits 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Anderson v. Creighton, 483 U.S. 635 (1987) 2, 12, 14, 15, 16

Bray v. County of San Diego, No. 93-55446, 1994 U.S. App. LEXIS 4289 (9th Cir. Mar. 2, 1994)..... 21

Cole v. Bone, 993 F.2d 1328 (8th Cir. 1993)..... 20

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 8

Davis v. Rennie, 264 F.3d 86 (1st Cir. 2001) 19

Davis v. Scherer, 468 U.S. 183 (1984)..... 18

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) ...20, 21

Edwards v. Gilbert, 867 F.2d 1271 (11th Cir. 1989) 18

Estate of Starks v. Enyart, 5 F.3d 230 (7th Cir. 1993) 19

Gagne v. City of Galveston, 805 F.2d 558 (5th Cir. 1986)..... 18

Graham v. Connor, 490 U.S. 386 (1989)..... 11, 12, 17

Harris v. Roderick, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998) 21, 22

Howerton v. Fletcher, 213 F.3d 171 (4th Cir. 2000)..... 17

McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999)..... 20

Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994)..... 18

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994)..... 18

Priester v. City of Rivera Beach, Fla, 208 F.3d 919 (11th Cir. 2000).....15, 19

TABLE OF AUTHORITIES – Continued

Page

Rosales v. City of Phoenix, No. 99-17204, 2001 U.S. App. LEXIS 27599, at *3 (9th Cir. Dec. 26, 2001) 21

Saucier v. Katz, 533 U.S. 194, 121 S.Ct. 2151 (2001) ..*passim*

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994)..... 18

Siegert v. Gilley, 500 U.S. 226 (1991)..... 8

Tennessee v. Garner, 471 U.S. 1 (1985)..10, 11, 16, 20, 22

United States v. Bradley, 196 F.3d 762 (7th Cir. 1999) 19

United States v. Lanier, 520 U.S. 259 (1997).....16, 19

Wilson v. Layne, 526 U.S. 603 (1999).....13, 15

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

Respondents, Deputy Sheriff Fred Lawrence Cox (in his individual and official capacity), Sheriff Michael Yeager (in his official capacity) and Coweta County, Georgia, respectfully submit this brief in opposition to the petition for writ of certiorari.

INTRODUCTION

In holding that Deputy Cox was shielded by qualified immunity, the Eleventh Circuit decided no important, unsettled question of federal law and raised no conflict among the circuit courts. The petitioner attempts to suggest otherwise only by erroneously characterizing the opinion below as if it did three things it did not.

First, the opinion below did not, as petitioner contends, hold that the use of force in this case was constitutionally reasonable, thereby encouraging similar conduct by other law enforcement officers. To the contrary, the Eleventh Circuit held that the alleged conduct, if proved, could constitute excessive force. The court followed the procedure prescribed by *Saucier v. Katz*, 533 U.S. 194, ___, 121 S.Ct. 2151 (2001), by considering the defense of qualified immunity only after first determining that the conduct as alleged would constitute a constitutional violation. Its qualified immunity holding therefore cannot be construed as a determination that the underlying conduct alleged by petitioner was constitutional.

Second, the opinion below does not, as petitioner contends, hold that an officer enjoys qualified immunity

even though the unlawfulness of his conduct is apparent based on existing law, so long as the courts have not decided a case on fundamentally similar facts. Instead, the Eleventh Circuit inquired whether existing law clearly established that the particular conduct here was unconstitutional. This is both consistent with and required by *Saucier v. Katz*, *Anderson v. Creighton*, 483 U.S. 635 (1987) and other decisions of this Court.

Third, the opinion below does not, as petitioner contends, conflict with decisions of the other circuit courts. The various cases cited by petitioner merely deny summary judgment based on materially different facts, and do not reflect a split among the circuits. Ultimately, the opinion below simply applied established qualified immunity law to the particular facts at issue. There is no issue warranting review on certiorari.

STATEMENT OF THE CASE

In a high-speed interstate chase on January 5, 1998, the petitioner, Jerry Charles Vaughan, was paralyzed by a bullet fired by Deputy Cox of the Sheriff's Department of Coweta County, Georgia. At the time, Vaughan was a passenger in a stolen truck that, as he admits, was recklessly fleeing police pursuit, endangering the lives and safety of other motorists during the morning rush hour heading into Atlanta, Georgia. Deputy Cox hit Vaughan in an attempt to disable either the truck or the driver. Pet. App. 4.

The chase started when Deputy Cox and fellow deputy sheriff, Jeff Looney, received a report of a stolen truck

heading north on I-85 towards Atlanta. Officers Cox and Looney soon observed a truck matching this description. Pet. App. 2-3, 26-28. Vaughan does not dispute that the officers had probable cause to believe that this was the stolen truck, and, in fact, it was. *Id.* at 32, 35. Nor does Vaughan deny that he and the driver stole that truck, as well as an attached trailer, two "waverunners" and another truck that they had earlier abandoned. Instead, he pleaded the Fifth Amendment.

After confirming that the occupants and the truck met the reported description, the officers attempted to stop the truck through a "rolling roadblock." Pet. App. 3, 28-29. Deputy Cox positioned his patrol car in front of the truck, with Officer Looney following the truck from behind. *Id.* Vaughan admits that, at least by this time, it was clear that the officers wanted the truck to pull over. *Id.* Deputy Cox then slowed down in an effort to induce the truck to reduce its speed. He testified that the truck rammed the back of his patrol car, almost causing him to lose control of his vehicle. *Id.* Although Vaughan disputes that the driver intentionally rammed Deputy Cox's patrol car, it is undisputed that, instead of slowing down for the rolling roadblock, the truck struck his vehicle at least once from behind. *Id.*

There is also no dispute that the driver refused to stop even after striking Deputy Cox's patrol car. Pet. App. 3-4, 28-29. Instead, as Vaughan admitted at his deposition (p. 89), the truck was "clearly trying to elude the police." Vaughan also admitted that the driver's reckless operation of the truck following this impact threatened the safety of other motorists:

Q. Okay. Obviously [the driver is] going over the speed limit, correct?

A. Yes, sir.

Q. He's weaving in and out of traffic, correct?

A. Yes, sir.

Q. And he has wave-runners on the back of his vehicle, correct?

A. Yes, sir.

Q. So he's driving in a dangerous manner at this time frame, isn't he?

A. Yes, sir.

Q. And he's driving in a reckless manner, correct?

A. Yes, sir.

* * *

Q. And he was putting other citizens on the interstate driving that morning in danger, correct?

A. Yes, sir.

Vaughan Dep., pp. 87-88; Pet. App. 29. Moreover, Vaughan concedes that the driver was driving in this reckless and dangerous manner before Deputy Cox fired the first shot:

Q. So when the police turned the lights on, you took off?

A. He [the driver] did. In other words, he sped up faster.

Q. Right. So before the shots are fired, he speeds up, correct?

A. When he [the police] turns the blue lights on, we speed up to probably about 80 or 85.

Q. So in effect, before shots are fired, he speeds up to avoid the police, correct?

A. Basically.

Q. Okay. And he's going 80 miles an hour now before shots are fired, correct?

A. Yes, sir.

Q. And it's clear at this point that he's trying to elude the police, correct? They got the lights on, and he, instead of slowing down, is speeding up, correct?

A. Yes, sir.

Q. And he's got wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And he's going 80 miles an hour with wave-runners on the back of his truck, correct?

A. Yes, sir.

Q. And there's other vehicles on the road and on the interstate that morning; is that correct?

A. That's correct.

Q. So he's driving before shots are fired in a dangerous manner, correct?

A. Yes, sir.

Q. Okay. And he's driving wrecklessly [sic] at that point, correct?

A. Yes, sir.

> Q. And then based on your recollection of the chronology of the events, shots are fired, correct?
>
> A. That's correct.

Vaughan Dep., pp. 89-91; Pet. App. 29, 35.

By this point, Deputy Cox had dropped back alongside the driver's side of the truck. He testified that the driver veered aggressively in his direction, attempting to sideswipe his patrol car. Pet. App. 30. He then fired three bullets at the truck, trying to disable the truck or the driver. *Id.* at 4. One of these shots struck Vaughan, paralyzing him from the waist down.[1] Vaughan disputes that the truck swerved toward Deputy Cox's patrol car, but, as noted above, he does not dispute that the truck was endangering the lives and safety of other motorists in its path before Deputy Cox fired his weapon. *Id.* at 29, 30, 35.

The chase did not end after that first volley of shots. The truck continued to weave recklessly in and out of traffic at high speeds, colliding with other motorists. Pet. App. 30-31. At one point, the truck pulled off the interstate at an exit, barreled through a busy intersection at high speed, running a stop sign and again colliding with innocent motorists. *Id.* Finally, while trying to force its

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[1] Vaughan initially claimed that he was struck by a second volley of shots that occurred much later in the chase. But, facing summary judgment, Vaughan changed his story to claim that this first volley of shots struck him. For the purposes of the appeal below and this petition, we assume that his current account is true.

way between two vehicles, the driver lost control and crashed. *Id.* at 31-32.

REASONS FOR DENYING THE WRIT

A. The Opinion Below Does Not Establish that Deadly Force is Justified to Stop Fleeing, Speeding Motorists.

Petitioner claims that the opinion below will lead law enforcement officers to conclude that it is lawful to use deadly force to stop fleeing motorists simply because they are speeding. Pet. 10-12. This prediction is baseless for two reasons. First, this is not a case in which a motorist was simply speeding. The petitioner's own perception was that, given all of the conditions on that rush hour morning, *this* vehicle was operating in a "dangerous" and "reckless" manner that immediately endangered the innocent motorists in its path. Certainly that could have been the perception of a reasonable law enforcement officer.

But, more importantly, the Eleventh Circuit did not hold that Deputy Cox's actions were constitutionally reasonable. To the contrary, before ever addressing the qualified immunity question, the Eleventh Circuit held that "[r]esolving all evidentiary disputes in Vaughan's favor, . . . a reasonable jury could find that Deputy Cox acted unreasonably in firing at the pickup." Pet. App. 10. Thus, the court did precisely as directed by *Saucier,* 533 U.S. at ___, 121 S.Ct. at 2156: "A court required to rule upon the qualified immunity issue must consider, then,

this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." *See also County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 232 (1991).

One purpose of requiring the court to first address the existence of a constitutional violation is to provide notice to officers subsequently confronting similar situations. Through this process, constitutional rights become "clearly established" for qualified immunity purposes.

> In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry.

Saucier, 533 U.S. at ___, 121 S.Ct. at 2156.

Because the Eleventh Circuit followed the approach prescribed in *Saucier*, the opinion below does not establish, for this or any subsequent case, that Deputy Cox's alleged conduct was constitutionally reasonable. To the contrary, this case gives notice that, if events occurred as claimed by the petitioner, such conduct likely would *not* be constitutional. Pet. App. 10-13. Even if the opinion falls short of conclusively foreclosing a qualified immunity defense based on subsequent, similar conduct by other officers, it certainly makes it *more* difficult, not less, to establish such a defense. Thus, the opinion below does

not, as petitioner suggests, declare open season on fleeing motorists.

Petitioner fails to distinguish the reasonableness inquiry governing his underlying excessive force claim from the qualified immunity analysis. This is precisely the distinction confirmed in *Saucier v. Katz*. In that case, this Court rejected the view of the Ninth Circuit that the qualified immunity analysis in an excessive force case simply duplicates the underlying determination of whether the use of force could be found to be unreasonable. 533 U.S. at ___, 121 S.Ct. at 2157. *Saucier* dispels any notion that sustaining a qualified immunity defense establishes the reasonableness of the underlying conduct for Fourth Amendment purposes:

> The qualified immunity inquiry . . . has a further dimension. The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

533 U.S. at ___, 121 S.Ct. at 2157-59. Thus, "in excessive force cases, . . . in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable." *Id.* at 2159.

Accordingly, by sustaining the defense of qualified immunity, the Eleventh Circuit did not hold that the conduct alleged by Vaughan would be constitutionally reasonable. Petitioner's first argument for certiorari is meritless because it depends on an over-reading of the qualified immunity portion of the opinion below in a manner contrary to *Saucier v. Katz*.

B. The Writ is Not Warranted to Consider a New and Special Treatment of the "Warning" Prong of *Tennessee v. Garner* for Qualified Immunity Purposes.

In *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985), this Court held that:

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

Petitioner urges that, unlike the other prongs of *Garner*'s test for constitutional reasonableness, the obligation to warn, where feasible, requires no further exposition for qualified immunity purposes. Pet. 13-15. He would have this Court hold that every officer has notice of the obligation to warn, where feasible, without regard to judicial

interpretation of this requirement under any particular facts. But the feasibility of a warning in any given factual setting is not "clearly established" merely from *Garner*, any more than the excessiveness of force in any given situation is "clearly established" by *Graham v. Connor*, 490 U.S. 386 (1989). In *Saucier*, this Court expressly rejected the same argument made with respect to the standard for excessive force established by *Graham*. 533 U.S. at ___, 121 S.Ct. at 2157. "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." 533 U.S. at ___, 121 S.Ct. at 2158.

Petitioner's argument regarding *Garner*'s warning requirement is no better than the argument that this Court rejected in *Saucier*. Whether a warning is "feasible" can depend just as much on the facts as whether force is "excessive." With respect to qualified immunity, there is no justification for analyzing the obligation to warn under any different standard than the other contours of the right to be free from excessive force. Instead, the "dispositive inquiry" is and should be whether, in light of the law established at the time, "it would be clear to a reasonable officer that [firing without prior warning] was unlawful in the situation he confronted." *Saucier*, 533 U.S. at ___, 121 S.Ct. at 2156.

Petitioner makes much of the Eleventh Circuit's holding that, taking the facts in the light most favorable to him, a reasonable jury could conclude that Deputy Cox could feasibly have warned the truck's occupants before firing. Pet. App. 10-11. Petitioner writes as if this should have disposed of the qualified immunity question. But, at

least after *Saucier, every* decision reaching the defense of qualified immunity involves alleged conduct that, if proved, would constitute a constitutional violation; "[i]f no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." 533 U.S. at ___, 121 S.Ct. at 2156. The question for qualified immunity purposes is not whether the failure to warn was constitutionally reasonable, but whether Deputy Cox could have had a "reasonable, but mistaken" belief that a warning was not feasible under the circumstances of the case. 533 U.S. at ___, 121 S.Ct. at 2158. This is an objective inquiry, based on the legal rules that were clearly established at the time. *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

C. The Court of Appeals Properly Analyzed the Question of Qualified Immunity Within the Factual Context of this Case.

The Eleventh Circuit concluded that, even if a jury determined that the truck posed no substantial danger to other motorists or that a warning was feasible under the circumstances, Deputy Cox could have reasonably, but mistakenly believed otherwise. Pet. App. 14-15. In so holding, the court did not, as Vaughan suggests in subsections B and D of his Petition, improperly focus on the facts of this case.

This Court has repeatedly and recently held that "clearly established" for qualified immunity purposes means clearly established in the particular situation confronted by the officer. "[T]here is no doubt that *Graham v.*

Connor, [490 U.S. 386 (1989)] clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. . . . The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted." Saucier,* 533 U.S. at ___, 121 S.Ct. at 2156 (emphasis added); *see also Wilson v. Layne,* 526 U.S. 603, 615 (1999) ("[A]s we explained in *Anderson,* the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established").

A qualified immunity standard that does not focus on the facts of the particular case cannot be reconciled with *Graham* and other cases emphasizing that judgments about the use of force by law enforcement officers must be fact-specific:

> Because "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation," [*Graham,* 490 U.S. at 397], the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. *Id.,* at 396. We set out a test that cautioned against the "20/20 vision of hindsight" in favor of deference to the judgment of reasonable officers on the scene. *Id.,* at 393, 396. *Graham* sets forth a list of factors relevant to the merits of the constitutional excessive force claim, *"requiring careful attention to the facts and circumstances of each particular case,* including the severity of the crime at issue,

> whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*, at 396.

Saucier, 533 U.S. at ___, 121 S.Ct. at 2158 (emphasis added).

The standard for determining whether it was "clearly established" that a particular use of force was constitutionally unreasonable cannot be less fact-sensitive than standard for determining whether it was in fact constitutionally unreasonable. Because the test for excessive force "must accommodate limitless factual circumstances," "the law cannot be elaborated from case to case." *Saucier*, 533 U.S. at ___, 121 S.Ct. at 2158; *see, e.g., Anderson*, 483 U.S. at 641 ("The relevant question in this case, for example, is the objective (albeit *fact-specific*) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.") (emphasis added).

To create the appearance of an issue for certiorari, Vaughan portrays the opinion below as holding that an officer enjoys qualified immunity even though the unlawfulness of his conduct is apparent based on existing law, so long as the courts have not decided a case on fundamentally similar facts. Pet. 13-15, 18-20. But the opinion below contains no holding or even dictum to this effect. Petitioner reads too much into the Eleventh Circuit's observation that "[n]or has the Supreme Court, this court, or the Supreme Court of Georgia held that a warning was necessary in factual circumstances similar to those in this case." Pet. App. 15. This was merely part –

and an appropriate part – of the Eleventh Circuit's broader analysis of whether the law was "defined in such a concrete way that a reasonable officer in Deputy Cox's position would have been compelled to conclude that it was unconstitutional to fire his weapon without first warning Vaughan and Rayson." *Id.*

The Eleventh Circuit properly inquired whether existing case law clearly established that the use of deadly force was constitutionally unreasonable "in factual circumstances similar to those in this case." Pet. App. 15 (citing *Anderson v. Creighton*). This is no different than the "relevant, dispositive inquiry" formulated in *Saucier* – "whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" 533 U.S. at ___, 121 S.Ct. at 2156 (emphasis added). In conducting this inquiry, the Eleventh Circuit went no further than cases such as *Saucier v. Katz*, *Anderson v. Creighton* and *Wilson v. Layne*. It did not, as petitioner suggests, impose an artificial requirement that there must be some fundamentally factually similar case, even if the unlawfulness of the officer's conduct is clear from existing precedent. Indeed, at the time that the Eleventh Circuit decided the instant case, it had already squarely rejected any such proposition. *See Priester v. City of Rivera Beach, Fla*, 208 F.3d 919, 926-27 (11th Cir. 2000) ("Considering these facts, no particularized case law was necessary for it to be clearly established that what Defendant Walker did violated Plaintiff's constitutional right to be free from the use of excessive force."). Here the court merely and appropriately considered whether the existing case law clearly established that the particular conduct at issue in Vaughan's case was unlawful. This is the

distinction drawn in *Anderson*: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent." 483 U.S. at 640 (citation omitted).

For this reason, there is no conflict between the opinion below and *United States v. Lanier*, 520 U.S. 259 (1997), as petitioner suggests. *Lanier* interpreted 18 U.S.C. § 242, which imposes criminal liability on an official violating constitutional rights under color of state law. This Court observed that "we have upheld convictions under § 241 or § 242 despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." 520 U.S. at 269. Nothing in the opinion below purports to hold to the contrary.

In holding that Deputy Cox was entitled to qualified immunity, the Eleventh Circuit not only applied the correct law, but applied it correctly. There is nothing erroneous, let alone cert-worthy, in holding that a law enforcement officer could reasonably, even if mistakenly, conclude that shooting to disable the truck or the driver was constitutionally permissible under the facts of this case. *Garner* permits the use of deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." 471 U.S. at 11. Here the circumstances of the case, even according to petitioner's own testimony, permitted a reasonable law enforcement officer to believe that the truck posed a threat of serious physical harm – even death – to

other motorists in its path. Thus, any factual dispute over whether the truck posed a threat to the officers is moot.

And, although a jury could reach a different conclusion, a law enforcement officer could reasonably, even if mistakenly, believe that no further warning was feasible under these circumstances. Deputy Cox was driving at 80 to 85 miles per hour on the left side of the fleeing truck, which petitioner concedes was operating in a "dangerous" and "reckless manner." He could have concluded that displaying a weapon from the left (driver's) seat in the patrol car was not a feasible way to warn the occupants of the truck, sitting in an elevated position in the lane to his right. And the driver had already ignored other clear warnings to stop, including blue lights, sirens and the "rolling roadblock." Indeed, the driver's response to these measures, even after striking Deputy Cox's patrol car, was simply to drive faster and more dangerously. Under these "tense, uncertain, and rapidly evolving" circumstances, Deputy Cox could have reasonably, even if mistakenly, concluded that no further warning was feasible or necessary, and that delay would only have increased the risks to others. *Graham*, 490 U.S. at 397.

In this qualified immunity context, petitioner's heavy reliance on law enforcement guidelines is unwarranted. As observed by the Fourth Circuit, modern law enforcement guidelines are formulated in large part to protect third party bystanders and officers from injury, and thus almost invariably exceed the standards dictated by the constitutional rights of the suspect. *Howerton v. Fletcher*, 213 F.3d 171, 173 (4th Cir. 2000). For example, there is no court decision clearly establishing that the *constitution*

prohibits discharging a firearm at or from a moving vehicle or pulling alongside a fleeing motorist in an attempt to force the motorist into a curb, parked car, or other obstacle. *Cf.* Pet. at 6-7. And, unlike Coweta County's policy on the use of force, the *constitution* does not require an officer to exhaust all other alternatives before using deadly force. *See, e.g., Menuel v. City of Atlanta,* 25 F.3d 990, 996-997 (11th Cir. 1994); *Plakas v. Drinski,* 19 F.3d 1143, 1148-50 (7th Cir. 1994); *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994). The law enforcement guidelines cited by Vaughan quite appropriately exceed the floor on police conduct established by the federal constitution and do not "clearly establish" constitutional rights for qualified immunity purposes. *See Davis v. Scherer,* 468 U.S. 183, 194-96 (1984) ("[O]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Edwards v. Gilbert,* 867 F.2d 1271, 1277 (11th Cir. 1989); *Gagne v. City of Galveston,* 805 F.2d 558, 560 & n.2 (5th Cir. 1986). Thus, the fact that certain conduct is plainly prohibited by law enforcement guidelines does not and should not mean that it is also prohibited by the constitution.

D. The Writ is Not Warranted to Resolve Any Conflict Among the Circuits.

In a scatter-shot approach, the petitioner alternatively urges that the opinion below conflicts with various other circuit court opinions. However, these cases do not conflict with the Eleventh Circuit's opinion, but

merely deny summary judgment on qualified immunity based on materially different facts.

In *Davis v. Rennie*, 264 F.3d 86 (1st Cir. 2001), the First Circuit cited *U.S. v. Lanier* for the proposition that " 'a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.' " 264 F.3d at 114 (quoting *Lanier*, 520 U.S. at 271). In attempting to portray a conflict between the opinion below and *Davis*, petitioner again wrongly characterizes the opinion below as sustaining the qualified immunity defense simply because there was no existing case with the same factual quirks. However, nothing in the Eleventh Circuit's opinion below holds that, even where prior "decisional law- . . . appl[ies] with obvious clarity to the specific conduct in question," the officer is entitled to qualified immunity so long as "the very action in question has not previously been held unlawful." *Id.* Instead, the Eleventh Circuit follows the opposite rule. *Priester*, 208 F.3d at 926-27.

In *Estate of Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993), the officer fired at a suspect who was driving towards him in a stolen cab. The Seventh Circuit held that the officer was not entitled to summary judgment on qualified immunity because, resolving all disputes in favor of the plaintiff, the fleeing cab was a threat to the officer only because he stepped directly into its path without necessity. There was no evidence or argument that the cab posed a threat to others. *Enyart* is a narrow holding, driven by the specific facts of the case, and does not conflict with the opinion below. And *United States v. Bradley*, 196 F.3d 762 (7th Cir. 1999) is markedly different

than Vaughan's case because the suspect (who had rolled through a stop sign) was driving at 25 miles per hour and posed no threat to anyone when the pursuing police officer shot him in the back.

McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999) neither helps the petitioner nor conflicts with the opinion below. There the officer shot the driver of a fleeing truck, but only *after* it had left the highway and rolled down an embankment. The Eighth Circuit held that the officer was not entitled to qualified immunity because, construing the evidence in favor of the plaintiff, the truck did not remain a threat to anyone after leaving the highway. The Eighth Circuit distinguished its earlier decision in *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), in which "an officer used deadly force to stop a renegade truck driver, who was at the time still in the process of fleeing from the police on a busy highway." 183 F.3d at 779. *Cole* held that the use of force was constitutionally reasonable under those circumstances. Vaughan's case is like *Cole*, not *McCaslin*, and there is no conflict between the Eighth and Eleventh Circuits.

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) also bears no resemblance to this case. There an officer fired a lead-filled "beanbag round" at the head of a person "who was walking at a 'steady gait' in his direction" but who "was unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." 272 F.3d at 1275. Unlike this case, *Deorle* was not a case in which "the officer has probable cause to believe that the suspect poses a threat of serious physical harm . . . to others." *Garner*, 471 U.S. at 11. Nor does the

legal analysis in *Deorle* conflict with the opinion below. The officer admitted knowing that the beanbag round was potentially lethal at the distance from which he fired, and a reasonable officer would have known from existing law that the use of lethal force was not justified under those facts. Under those circumstances, the Ninth Circuit appropriately declined to hold that the officer was entitled to qualified immunity simply because there were no published cases involving the use of lead-filled beanbag rounds. Nothing in this analysis conflicts with the Eleventh Circuit's opinion below.

In *Rosales v. City of Phoenix*, No. 99-17204, 2001 U.S. App. LEXIS 27599, at *3 (9th Cir. Dec. 26, 2001), the Ninth Circuit not surprisingly affirmed the denial of summary judgment where the officers shot a fleeing suspect in the back, but admitted that they "did not consider [him] a fleeing felon," that he "never turned and aimed his gun at them," and there was no evidence that he posed a threat to others. In *Bray v. County of San Diego*, No. 93-55446, 1994 U.S. App. LEXIS 4289 (9th Cir. Mar. 2, 1994), the Ninth Circuit affirmed the denial of summary judgment on a qualified immunity defense where the officer fired as the suspect was backing his truck towards the officer's patrol car in a parking lot from a distance of ten feet. Under those facts, the officer had no reasonable basis to fear for his own life or safety, and the case did not involve any threat to others.

Finally, there is no conflict between the opinion below and *Harris v. Roderick*, 126 F.3d 1189 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), which arose from the 1992 events at Ruby Ridge. The Ninth Circuit affirmed

the denial of qualified immunity with respect to the "Special Rules of Engagement" formulated for Ruby Ridge, which allegedly included the authorization to shoot on sight any adult male in the vicinity of the Weaver Cabin, regardless of any threat he posed. 126 F.3d at 1202. Taking this allegation as true, the Ninth Circuit held that it was clearly established that those Special Rules of Engagement did not comply with *Tennessee v. Garner*. *Id.* The only specific shooting examined by the Ninth Circuit is not analogous to Vaughan's case. The agent shot as the plaintiff was running back to the cabin and was not making an aggressive move of any kind. *Id.* at 1202-03. At this point, the officer and his fellow agents "were safely ensconced on the hill overlooking the Weaver cabin." *Id. Harris* does not conflict with the opinion below.

In sum, the cases cited by petitioner simply deny summary judgment on the qualified immunity defense under facts materially different than those at issue here. Instead of demonstrating any conflict among the circuits, these cases simply emphasize the factually intensive nature of the qualified immunity defense.

CONCLUSION

In the opinion below, the Eleventh Circuit applied correct principles of qualified immunity law in a manner that does not warrant review on certiorari. The writ should be denied.

Respectfully submitted,

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